IN THE

United States Court of Appeals

FOR THE NINTH CIRCUIT

THE FLUOR CORPORATION, LTD., et al,
UNION TANK CAR COMPANY, WARD INDUSTRIES CORPORATION, now known as DRAGOR SHIPPING CORPORATION,

Appellants, Cross-Appellees,

vs.

U. S. A. ex rel MOSHER STEEL COMPANY,

Appellee, Cross-Appellant.

No. 21307
No. 21307A
No. 21307B
No. 21307C

REPLY BRIEF OF APPELLANTS

THE FLUOR CORPORATION, LTD., FEDERAL INSURANCE COMPANY, VIGILANT INSURANCE COMPANY, INSURANCE COMPANY OF NORTH AMERICA, GENERAL INSURANCE COMPANY OF AMERICA, SEABOARD SURETY COMPANY, AMERICAN RE-INSURANCE COMPANY, EMPLOYERS REINSURANCE CORPORATION and GENERAL REINSURANCE CORPORATION

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SUBJECT INDEX

TABLE OF AUTHORITIES CITED

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The opening brief of Fluor and the Sureties asserted that the Miller Act, pursuant to which judgment was rendered against these appellants, was intended only to protect persons having contractual relationships with a subcontractor on government work *as a materialman, laborer or subcontractor.*

We further asserted that the obligation of Union "to pay Mosher directly" found by the court (Conclusion of Law No. 6, A.R. 1238) was not the type of "direct contractual relationship" contemplated by the Miller Act. (40 U.S.C. 270b)

Finally, we asserted:

> "Exhaustive research has failed to produce a single case in which a court has held that a claimant, too remote in the chain of subcontracts to come under the protection of the Miller Act is entitled to recover against the prime contractor and its sureties because it had received a promise from the subcontractor that it would be paid."

Mosher does not quarrel with any of these assertions. Instead it now for the first time claims to be a materialman or subcontractor to Union (p.3):

> ". . . Mosher was concededly a laborer and materialman directly for Union under the Joint Venture purchase orders, and since Union was directly obligated to Mosher for the payment thereof, the contractual relationship between Mosher and Union was in fact 'as a materialman, laborer, or subcontractor.'"

An examination of the joint venture purchase orders (Jt.Ex. 9 and 10) and of the trial court's findings of fact and conclusions of law (A.R. 1220) show that this position is completely untenable.

Joint Exhibits 9 and 10 are the usual form of purchase order. They are dated 11/3/61 and signed by Mr. Wright, the purchasing agent for IMI-Ward, a joint venture, on Idaho-Maryland Industries printed forms, because at that time IMI-Ward had not yet acquired a supply. (Finding of Fact No. 30, A.R. 1229) Union was not a party.

Mosher does not give any transcript or record reference to support its statement that it was a "materialman, laborer, or sub-contractor." It did not propose a Finding (A.R. 1384) or a Conclusion (A.R. 1406) to this effect, and the findings and conclusions entered by the court lend Mosher no support. On the contrary, it is clear that Conclusions No. 4 and No. 6 (A.R. 1238) that the court considered Mosher to be a materialman or subcontractor to *IMI-Ward* and predicated IMI-Ward's liability on the terms of the purchase orders, but based the liability of Union on "Page's telephone conversation with Moore on November 19, 1961, and his telegram to Moore of the same date . . ."

Since Mosher now concedes that the validity of its judgment against these appellants depends upon an express or implied finding by the court that it is a materialman or subcontractor to Union, and the facts are to the contrary, it is clear that the judgment against these appellants under the Miller Act cannot stand. As we pointed out, our research has disclosed not a single case granting relief under the Miller Act to a litigant in Mosher's position, and Mosher has produced a brief with no citations of authority whatsoever.

Mosher dismisses as "poppycock" the statement in our brief that there was no conceivable way in which Fluor could protect itself in the fact situation presented by this case, and goes outside of the record to hint that there were change orders and other claims out of which Fluor could have withheld sums due Graver, carefully refraining from stating that such claims were paid and not elaborating on the legal consequences to Fluor of such an act. The suggestion is that Fluor should have engaged in litigation with Graver to protect Mosher from the consequences of its incompetent handling of this transaction. It should be remembered that Mosher ad-

mittedly never, at any time, sent its invoices to Graver (TR 453).

The Supreme Court has suggested no such duty on a prime contractor. In *MacEvoy v. U.S.* (1944), 322 U.S. 102, 64 S. Ct. 890, 88 L. Ed. 1163, the court made it clear that a prime contractor is entitled to know, in sufficient time to protect himself by bond or otherwise, of the existence of a person claiming to be a materialman or subcontractor.

The court said:

> "The relatively few subcontractors who perform part of the original contract represent in a sense the prime contractor and are well known to him. It is easy for the prime contractor to secure himself against loss by requiring the subcontractors to give security by bond, or otherwise, for the payment of those who contract directly with the subcontractors. United States use of *Hill v. American Surety Co.* supra (200 U.S. 204, 50 L.Ed. 441, 26 S. Ct. 168); *Mankin v. United States,* supra (215 U.S. 540, 54 L.Ed. 315, 30 S. Ct. 174). But this method of protection is generally inadequate to cope with remote and undeterminable liabilities incurred by an ordinary materialman, who may be a manufacturer, a wholesaler or a retailer. Many such materialmen are usually involved in large projects; they deal in turn with innumerable submaterialmen and laborers. To impose unlimited liability under the payment bond to those submaterialmen and laborers is to create a precarious and perilous risk on the prime contractor and his surety. To sanction such a risk requires clear language in the statute and in the bond so as to leave no alternative."

We respectfully submit that the judgment against these appellants finds no support in fact or law and should be reversed.

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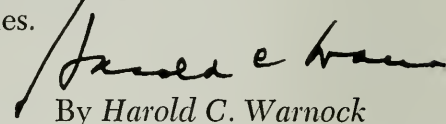
CERTIFICATE OF COMPLIANCE

I certify that, in connection with the preparation of this brief, I have examined Rules 18, 19 and 39 of the United States Court of Appeals for the Ninth Circuit, and that, in my opinion, the foregoing brief is in full compliance with those rules.



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